SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

No. [redacted] -178

MALCOLM B. DEVERS,

Petitioner,

v.

DISTRICT OF COLUMBIA NATIONAL BANK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

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The petitioner, Malcolm B. Devers prays that a writ of certiorari issue to review the judgment entered by the Supreme Court of Appeals of Virginia on the 19th day of January, 1970.

CITATIONS AS TO OPINIONS BELOW

No opinions were rendered by the Supreme Court of Appeals of Virginia in finally disposing of this cause. This cause was affirmed by a formal order entered on the 19th day of January, 1970, denying writ of error in this cause thus affirming the judgment of the Trial Court. This order is attached hereto as a part of the petitioner's appendix.

JURISDICTION

The judgment of the Supreme Court of Appeals of Virginia denying the writ of error was entered on January 19, 1970. The action of the Supreme Court of Appeals of Virginia thus constituted a final judgment and affirmance of this judgment entered in the Circuit Court of Arlington County, Virginia, on the 6th day of August, 1969, became final. On April 15, 1970, by order of Chief Justice Burger, the time within which to file a petition for a writ of certiorari was extended to May 20, 1970. The jurisdiction of this Court is invoked under Title 28, U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Did the Trial Court below err in arbitrarily refusing to require the respondent to make an election of the cause of action under which it would proceed in its case thus depriving petitioner of due process in granting a judgment in favor of respondent.

2. Did the action of the Trial Court below deny petitioner due process when it is apparent on the record that he was never served personally with process in the case of a void foreign judgment (Maryland) obtained by respondent against petitroner and subsequently sued upon in the Court below (Virginia), resulting in a verdict in favor of respondent which verdict was plainly wrong and without evidence to support it.

3. Did the Trial Court below deny petitioner due process in failing to find that the foreign judgment sued on was void because the Court (Maryland) entering the judgment did not have jurisdiction over the petitioner since service of process was never obtained upon him and counsel who entered an appearance for petitioner did so inadvertently and through mistake and was never sanctioned nor authorized to appear for petitioner in that cause.

4. Did the Trial Court below err and deny petitioner due process in failing to rule on all of the merits and issues raised in this case in controversy between respondent and petitioner since respondent's pleadings initiated in the Court below presented petitioner an opportunity for the first time to actually contest respondent's claim against petitioner.

STATEMENT OF THE CASE

On November 18, 1967, the respondent, a non-resident banking institution, filed an attachment before judgment in the Circuit Court of Arlington County, Virginia, alleging a cause of action against petitioner based on a judgment rendered in the Circuit Court of Prince George's County, Maryland. Said respondent asked for a judgment against the petitioner in the amount of $23,394.55, plus interest, attorney's fees and costs.

An answer was duly filed by the petitioner alleging that the foreign judgment obtained in Maryland was void on the grounds of lack of jurisdiction. Whereupon, the respondent, pursuant to an Order of the Court, was granted leave to amend. The respondent's amended petition alleged two causes of action. Count I contained the original cause of action and Count II alleged a cause of action based on an alleged guarantee by the petitioner of an obligation of a co-defendant, U.S. Metal Plastics, Inc., a corporation of which the petitioner was president.

On the petitioner's Motion the action was removed to the U.S. District Court for the Eastern District of Virginia on the grounds of diversity of citizenship. Subsequently, the case was remanded to the Circuit Court of Arlington County, Virginia, on the grounds of lack of venue. After the petitioner filed his Answer to the amended petition, a pre-trial hearing was had and a Pre-Trial Memorandum was endorsed by all counsel and the Judge on March 13, 1969.

On or about June 18, 1964, the respondent filed a suit in the Circuit Court for Prince George's County, Maryland, against U.S. Metal Plastics, Inc., a corporation, and the Petitioner here, (Plaintiff's Exhibit A). The suit alleged a cause of action against U.S. Metal Plastics, Inc., a corporation, on a certain promissory note dated March 9, 1964, in the sum of $25,000.00 with interest at 6% per annum and a cause of action for the same amount against the petitioner, who was the president and a stockholder of said corporation at the time, as the guarantor of said obligation.

The Sheriff's return, dated June 23, 1964, shows that service was had on U.S. Metal Plastics, Inc., by serving its vice-president. On the same day the return read, "Non Est" as to the petitioner, Malcolm B. Devers. One Werner Westermann, the vice-president of said defendant corporation, delivered the suit papers to Wallace R. Schubert, Esq., an attorney, practicing in the District of Columbia, who had acted as counsel for the corporation and for the petitioner on past matters. Mr. Schubert, subsequently, forwarded the case to an associate, J. Ambrose Kiley, Esq., an attorney with offices in Prince George's County, Maryland. The testimony of both attorneys and the petitioner was to the effect that Mr. Kiley was to represent the corporation in the suit, but was not to represent the petitioner, Malcolm B. Devers, who had not been served and was not before the Court.

On or about August 3, 1964, Mr. Kiley filed an Opposition to the Respondent's Motion for Summary Judgment, together with an Affidavit in Support of said Opposition,

(Plaintiff's Exhibit #2 and #3). The language in Mr. Kiley's pleading made reference to the plural "defendants", giving the impression that the pleading was filed on behalf of the petitioner, Malcolm B. Devers, as well as the corporate defendant. Mr. Kiley testified that it was never his intention to enter an appearance for the petitioner, Malcolm B. Devers, and that the language used in said pleading was due to a mistake and inadvertance on his part. The petitioner testified that he had executed the supporting affidavit only as an officer of the corporation.

On August 28, 1964, the respondent's Motion for Summary Judgment was granted and a Judgment entered against U.S. Metal Plastics, Inc., and the petitioner in the amount of $25,708.33 with interest from date and collection fees in the amount of $3,856.25 and costs in the amount of $29.00. The judgment was granted Ex parte; Mr. Kiley not appearing at the time. It was the testimony of Mr. Kiley that he had not received notice that the plaintiff's Motion for Summary Judgment was set for a hearing on August 28, 1964. The respondent introduced a Notice from the Court's Assignment Office, (Plaintiff's Exhibit #6), which its counsel, David Cahoun, Esq., testified he had received. At no time did the defendant's counsel, Mr. Kiley, make an appearance to contest the respondent's claim against the petitioner. He did make one appearance subsequent to the taking of judgment, in the office of the respondent's counsel, Mr. Cahoun, upon depositions of Mr. Claude Vess, the accountant for U.S. Metal Plastics, Inc., and the petitioner; the purpose of the depositions being in aid of execution.

There was testimony from the petitioner that the respondent received approximately $3,500.00 from the sale of property owned by the petitioner in Luray, Page County, Virginia. It was unclear as to the nature of the proceedings initiated by the respondent to accomplish the resulting sale. The date of the sale and disbursement to the respondent was fixed as the early part of 1965. The petitioner's

testimony was that he had not been notified of any judicial proceeding involving his property in Luray and only became aware of it when notified by his agent. The petitioner was residing in Florida at the time and because of ill health and the small amount involved, decided not to retain counsel for the purpose of contesting the respondent's action.

Until the time that this proceeding was initiated on November 18, 1967, the respondent had taken no other action to satisfy its judgment against the petitioner. The petitioner, being of the belief, and being so advised by his counsel, that the Court lacked jurisdiction over him and that the judgment was void, took no action to have the judgment set aside. When this action was initiated, the Court gained jurisdiction over the petitioner, who was a non-resident at the time, and the petitioner immediately entered this appearance to contest this action.

The case was heard without a jury on June 25, 1969. At the outset, the petitioner made an oral Motion that the respondent elect to proceed on one Count instead of two on the grounds that the two causes of action constituted a misjoinder and the doctrine of merger applied. The Motion was denied. After hearing the testimony on both counts the trial court found for the respondent on Count I and made no finding on Count II.

The petitioner duly excepted to the trial courts findings and judgment for the respondent. A final Order was entered on August 6, 1969 and from this judgment the petitioner appealed to the Supreme Court of Appeals of Virginia. The Supreme Court of Appeals of Virginia refused the writ of error and denied petitioner's appeal, affirming the judgment of the Circuit Court of Arlington County, Virginia.

Petitioner submits that he was denied fundamental rights and deprived of his property in violation of due process as guaranteed unto him by the Fifth Amendment of the Constitution of the United States.

REASONS FOR GRANTING THE WRIT

I

Petitioner urges that the judgment of the Supreme Court of Appeals of Virginia as announced in its formal order (App. A), affirming the judgment of the trial court compounded the erroneous determinations made and the erroneous judgment entered by the Circuit Court of Arlington County, Virginia. The trial court did indeed err in refusing to require respondent to make an election of the cause of action under which it would proceed in this case. The respondent chose the forum in which to proceed against petitioner, as well as the theories under which it sought to claim and establish liability on the part of petitioner to it, as set forth in respondent's pleadings. Consequently, the trial court should have compelled respondent to make an election of the cause of action on which it would proceed, and failure to do so, was serious error against the rights of petitioner.

In the respondent's original Petition for Attachment, (Clerk's Index #1), the cause of action was based solely on a judgment entered against the petitioner in the Circuit Court of Prince George's County, Maryland. After the petitioner filed his Answer, (Clerk's Index #27), the respondent moved to amend his petition and did so by filing its Amended Petition for Attachment Complaint to Recover Debt Due from Guarantor, (Clerk's Index #36). In the amended petition the respondent states two causes of action designating them as Count One, a cause of action based on the aforesaid foreign judgment; and Count Two, a cause of action based on the petitioner's obligation as guarantor on a corporate promissory note. The petitioner made an oral motion that the respondent be required to make an election. The Trial Court denied the motion on the grounds that the two counts were not inconsistent, being pleadings in the alternative.

It is felt that the trial Court's reasoning merely begs the question and does not justify pleadings which are obviously and plainly bad. The respondent made the choice of pro-

ceeding to sue on its judgment. Its original cause of action, one in contract, had been merged in the judgment. The doctrine of merger is a well established doctrine and is plainly stated under the heading of "Judgments" in *30A AM JUR 365* and the numerous authorities cited therein:

> "One effect of a judgment is to merge therein the cause of action on which the action is brought."

In the case of *Sands v. Roccer*, 118 Va. 191, decided in 1915, the Court there said:

> "When the judgment was rendered on the contract in this case, such contract and all rights under it ceased to exist, and the judgment became the only and superior evidence of the defendant's liability. That contract having been merged in the judgment, and thereby become functus officio, it could not be revised and made the basis of another judgment thereon in this second suit."

This ruling of the trial court clearly abrogated petitioner's fundamental rights to due process under the 5th and 14th Amendments to the Constitution of the United States.

II & III

The record here is unequivocal that petitioner was never served with process in respondent's case filed in the Circuit Court of Prince George's County, Maryland against petitioner; and the record is equally unequivocal and clear that the appearance of counsel, J. Ambrose Kiley, Esq., on behalf of petitioner therein, occurred only, solely and exclusively through mistake, inadvertence and carelessness.

In the light of these circumstances, a valid judgment in the Maryland Court could hardly obtain and endure against petitioner as a matter of law.

It had been stipulated in the Pre-trial Memorandum (Clerk's Index #60), that the petitioner was never served as

a party in the Prince George's County, Maryland suit. The next question would be whether the petitioner entered an appearance, thereby waiving service of process. The evidence is abundantly clear that the petitioner did not enter an appearance and did not authorize J. Ambrose Kiley, Esq., counsel of record for the petitioner to do so. Wallace L. Schubert, Esq., counsel for the petitioner, received the suit papers filed in the Maryland Court and forwarded them to his Maryland associate, Mr. Kiley, for the purpose of representing U.S. Metal Plastics, Inc., the corporate defendant, (Tr. 44 and 45). The instructions to Mr. Kiley were that he was not to enter an appearance for the petitioner, (Tr. 47 and 48). Mr. Kiley also testified that he was not authorized to enter an appearance for the petitioner, (Tr. 66, 67, 68, 75, 76 and 77). In addition to the testimony of both counsel involved, the petitioner clearly testified that neither attorney had the authority or were retained for the purpose of representing him, (Tr. 97, 98, 99 and 102).

Although the record of the Maryland proceeding shows an appearance by Mr. Kiley when he filed an Opposition and supporting Affidavit on behalf of the petitioner, as well as the corporate defendant, (Pl. #2 and #3), he satisfactorily explains this action as one of mistake and misadventure, (Tr. 69, 70 and 71). If Mr. Kiley were guilty of anything, it would be simply carelessness and neglect. It was never his intention to represent the petitioner as is evidenced by subsequent events. The evidence clearly shows that Mr. Kiley made no effort to represent either the petitioner or the corporate defendant. The record of the proceedings and the testimony shows that a judgment was taken by the respondent, Ex Parte, (Plaintiff's Exhibit #1 and Tr. 28). Throughout the whole proceeding, Mr. Kiley's sole effort was limited to one appearance in connection with depositions taken in aid of execution, (Tr. 74).

If, in fact, Mr. Kiley had any intention of appearing on behalf of the corporate defendant or this petitioner, or both, that opportunity, because of a proceedural error,

failed to materialize. Mr. Kiley testified that he did not receive notice from the Court (Plaintiff's Exhibit #6), that the plaintiff would ask for judgment on August 28, 1964. (Tr. 73).

As for the petitioner's part in the entire proceeding, we know that he was not served and that he took some action in the form of executing an Affidavit, (Plaintiff's Exhibit #3), in the capacity of an officer of the corporate defendant for the sole purpose of showing an understanding with the respondent that the terms of the note being sued on had been modified in certain respects and that the corporate defendant might have a defense to the respondent's claim.

It was conceded by the petitioner that the respondent took some action against his property in Luray, Virginia, and that the respondent received approximately $3,500.00 from the proceeds of the sale (Tr. 102). The respondent testified further, that he was not notified of the nature of the proceeding whereby his property was sold and that because of his poor health and the expense of litigation he took no action to enjoin the sale, (Tr. 103 and 104).

Despite the overwhelming evidence introduced to support the petitioner's position that the Court never had jurisdiction to enter a judgment against him, the trial Court found that the petitioner was barred from raising this defense. The record of this case makes it manifest and clear that it is insufficient in law and equity to allow this judgment to obtain and stand against petitioner.

The case of *Owens v. McCloskey (Owens v. Henry)*, 161 U.S. 64; 16 S. Ct. 693, 40 L. Ed. 837, it was held that a judgment rendered in an action of debt against a non-resident, who has not been served with process or failed to voluntarily appear as a defendant in such case, has no binding force. In the case at bar the record is unequivocally clear that petitioner did not voluntarily appear as a defendant in this cause, nor did he authorize, instruct or direct any one, or any attorney, to appear for him as a defendant in this cause.

Petitioner submits that the determination of the lower Court below, to the contrary, based upon the record of this cause, even giving most favorable consideration to the inferences indulged in by the Court below, can hardly be detached from arbitrary action, contrary to law. In the case of *Webster v. Reid*, 11 How. 437, 13 L. Ed. 761, it was held that no person is required to answer a suit on whom process has not been served, or whose property has not been attached, and that a personal judgment against such a person is a nullity.

It has been held that a valid proceeding can not be had against a person until he has been notified thereof by proper summons, unless he voluntarily waives such constitutional right. See *Harvey v. Slocum*, 29 A.2d 276, 181 Md. 205 and *Little v. Miller*, 153 A.2d 271, 220 Md. 309. In the case at bar, it is unequivocally clear that petitioner was never served with process, and it is equally apparent and clear that he never did, in any active or overt manner or knowingly waive this basic right, to his detriment, nor did he ever voluntarily waive service of process upon himself. In the case of *Drury v. Brightwood Sanitarium Co.*, 133 A. 314, 150 Md. 585, it was held that an attorney without authority to employ another attorney to represent trustees, could not bind them by any representation to such attorney in absence of showing that they held him out as their representative. In the case at bar, petitioner neither hired an attorney to represent him in this cause, nor did he direct an attorney to retain another attorney to act for him in any capacity in the premises, nor did he seek or request his appearance to be made in this case, in any manner or under any circumstances.

Also see the case of *Hanzer v. Flavio*, 125 N.E. 612, 234 Mass. 320, where it was held that an attorney employed by some of several defendants has no authority to appear for other defendants. The fact that Mr. Kiley appeared for other defendants in this case, namely, Westerman, et al., did not, in any way authorize this attorney to act for appellant herein.

The record of this case clearly shows that Mr. Kiley made an unauthorized appearance for petitioner. Such an unauthorized appearance makes a judgment based thereon voidable and according to some decisions the judgment is void. See *Wiley v. Moses*, 42 N.Y.S.2d 4, 266 App. Div. 801; *Taylor v. Oulie*, 212 N.W. 931; *Street v. Dexter*, 77 P.2d 707, 182 Okla. 360. A personal judgment in Maryland can not be had against a non-resident without personal service of process within the jurisdiction or such a general appearance in the case as amounts thereto. See *McQuellen v. National Cash Register Co.* (Md. 1940) 112 F.2d 877, cert. denied 61 S. Ct. 140, 311 U.S. 695, rehearing denied 61 S. Ct. 316, 311 U.S. 729. In the case of *Employers' Liability Assurance Corp. v. Perkins*, 181 A. 436, 169 Md. 269, it was held that in an action to establish personal liability, the court can not acquire jurisdiction over person of one not resident within its territorial jurisdiction, except by actual service of notice upon him or upon some one authorized to accept service in his behalf, or by his waiver of lack of service.

In the case of *Levy v. Fitzpatrick*, 15 Pet. 167, 10 L. Ed. 699, it was held that no judgment can be rendered by a court of the United States against a defendant who is not an inhabitant of the district where the court is sitting, unless process has been served upon his person within that district, or unless he waives the necessity of such process by entering his appearance in the suit. In the case of *Godfrey v. Terry*, 97 U.S. 171, 24 L. Ed. 944, it was held that a judgment can not be rendered against a party not brought within the jurisdiction of the court, merely on the ground of a similar liability in other parties. A decree where defendant was never brought before the court is *coram non judice* void. See *D'Arcy v. Ketchum*, 11 How 165, 13 L. Ed. 648. In the case at bar, the general appearance by Mr. Kiley for an other defendant which mistakenly included ~~appellant~~ petitioner also, was actually and unequivocally an unauthorized appearance as borne out by the record here.

Thus the judgment entered by the lower court against petitioner is voidable or even void. See *Wiley v. Moses, supra; Taylor v. Oulie, supra;* and *Street v. Dexter, supra.* Surely, petitioner submits, awareness induced through an unauthorized appearance, a mistake, inadvertence and/or carelessness is neither sufficient nor adequate here, to permit a valid and subsisting judgment to obtain against him.

In the case of *Water Hammer Arrester Corp. v. Tower,* 66 F. Supp. 732, affirmed 156 F.2d 775, cert. denied 67 S. Ct. 501, 329 U.S. 806, rehearing denied 67 S. Ct. 674, cert. denied 68 S. Ct. 452, the court held that the relationship between an attorney and his client is too sacred to admit even the shadow of abuse, and every doubt will be resolved in favor of the client.

A Maryland Court has no jurisdiction to render judgment against one not served within the state, nor voluntarily appearing before the Court. See *Piedmont-Mt. Airy Guano Company of Baltimore v. Merritt,* 140 A. 62, 154 Md. 226; *Keen v. Keen,* 68 A.2d 200, 191 Md. 31; *Garner v. Garner,* 56 Md. 127; *Wilmer v. Epstein,* 81 A. 379, 116 Md. 140.

In the case of *National Exchange Bank v. Wiley,* 195 U.S. 257, 25 S. Ct. 70, 49 L. Ed. 184, it was held that a personal judgment against one not before the Court by actual service of process, or who did not appear in person, or by an authorized attorney, would be invalid as not being in conformity with due process of law.

This Court should unhesitatingly correct this error. It has long been held that an attorney is impliedly bound to act diligently and skillfully in the conduct of his client's case. *Wilcox v. Plummer,* 4 Pet. 172, 7 L. Ed. 821. Defendant's right to representation throughout all stages of trial and guaranty of due process, is violated where representation is of such low caliber as to amount to no representation. *Smallwood v. Warden Maryland Penitentiary,* 205 F. Supp. 325, U.S.D.C. Md. The denial of effective assistance of counsel to one charged with the same violates due

process. See *Hawk v. Olson*, 326 U.S. 271, 66 S. Ct. 116; and *Reece v. Georgia*, 350 U.S. 85, 76 S. Ct. 167.

Petitioner submits that it is apparent from the record here that his present plight resulting in respondent's personal judgment against him, resulted neither from acts of omission or commission on his part, but exclusively from mistake, inadvertence and carelessness and unauthorized appearance on his behalf by an attorney without actual right to appear for him.

In the case of *Bashin v. Montedonico*, 26 F. Supp. 894, affirmed 115 F.2d 837, it was held that general retainers do not authorize lawyers to accept service of process by which a Court acquires jurisdiction over a party. The relationship between an attorney and his client compels this. See *Water Hamner Arrester Corp. v. Tower, supra.* It has been held that a decree entered against persons not served with process, but for whom an unauthorized appearance has been entered by an attorney, will be reversed. See *Hatfield v. King*, 184 U.S. 162, 22 S. Ct. 477, 46 L. Ed. 481.

As early as 1847, the U.S. Supreme Court ruled, in the case of *Shelton v. Tiffin*, 6 Howard 183,

> "An appearance for a party not served, by counsel who has no authority to waive process and defend the suit, does not bind the party, and the judgment or decree is a nullity. Such want of authority may be proved by the attorney himself."

In this case the attorney testified that his appearance was an inadvertance on his part.

The Court stated further in arriving at its ruling:

> "This evidence does not contradict the record, but explains it. The appearance was the act of the counsel, and not the act of the Court. Had the entry been, that L. P. Perry came personally into Court and waived process, it could not have been controverted. But

> the appearance by counsel who had no authority to waive process, or to defend the suit for L. P. Perry, may be explained. An appearance by counsel under such circumstances, to the prejudice of a party, subjects the counsel to damages; but this would not sufficiently protect the rights of the defendant. He is not bound by the proceedings and there is no other principle which can afford him adequate protection. The judgment, therefore, against L. P. Perry must be considered a nullity, and consequently did not authorize the seizure and sale of his property."

Virginia, as early as 1898, in the case of *McGeorge v. Big-Stone Gap Imp. Co.*, 88 Fed. Rep. 599, adopted this position and cited the case of *Shelton v. Tiffin, supra*, in its ruling. Again, in the case of *Nixon v. Rowland*, 192 Va. 37, the Court stated,

> "General appearance by attorney must be authorized before it will confer jurisdiction of the person on the Court."

Did, then, the Court apply the law, as above stated, in the case at bar? It is submitted that the trial Court did not.

As indicated previously, the trail Court ruled that no collateral attack could be made on a foreign judgment. It is respectfully submitted, however, that *Beck v. Semmes' Adm'r*, 145 Va. 429, holds otherwise. In this case, decided in 1926, the Court said,

> "Trial Court's decision cannot make illegal service or appearance legal so as to bar collateral attack on judgment."
>
> "Where it is sought to enforce in one state a judgment rendered in another state, the jurisdiction of the Court rendering the judgment may be assailed collaterally."

In *Snead v. Atkinson*, 121 Va. 182, the Court expressed its opinion with respect to judgments rendered by a Court having no jurisdiction of the party defendant. The Court there said:

> "The cases are decisive of the case at bar, for it must be indisputable that in order to enter valid orders a Court must have jurisdiction of the cause in which such orders can be entered in a case which has been finally disposed of, unless it has been first legally reinstated. . . . Mr. Freeman says as to a void judgment:
>
> > "If it be null, no action on the part of the plaintiff, no inaction upon the part of the defendant, no resulting equity in the hands of third persons, can invest it with any of the elements of power or vitality." *Freeman On Judgments*, Sec. 117; *Wade v. Hancock*, 76 Va. 626."

Again in the case of *Beck v. Semones' Adm'r, supra*, the Court there said, in determining the effect of a void judgment:

> "In order to render the judgments valid, it was necessary that Beck should have had authority to act at the time the judgments were rendered. No subsequent action of the board of directors could confer jurisdiction upon the court, if it did not exist when the judgments were rendered. If the defendant was not legally before the Court when the judgments were rendered, the judgments were void."

It would appear then, from the authorities cited, that if the evidence in the case at bar establishes that the petitioner did not waive service of process and was not properly before the Court, then the Court never had jurisdiction to render a judgment. The judgment rendered must be considered void and no action or inaction by the defendant could make it otherwise.

The testimony submitted by the petitioner on this issue remains uncontradicted, unimpeachable and conclusive. The two attorneys involved are reputable members of the bar, having practiced in the area for 30 years and 35 years respectively, (Tr. 64 and 66). All of their testimony must be believed because, and particularly in the case of Mr. Kiley's case, of strong admissions against interest.

The present case in controversy in the trial forum below, was the first and only occasion wherein petitioner has been afforded an opportunity to actually contest respondent's claims against him. Here, respondent was served with process and here respondent filed pleadings contesting the claims of respondent, and engaged counsel to actively and personally represent him. Here for the first time, all of the substantial and contending issues on the merits of respondents claims against petitioner, were raised and submitted to the trial court for its determination. Notwithstanding all of the foregoing, the trial court failed to act upon all of the evidence submitted by the contending parties, and the trial court utterly failed, neglected and refused to resolve these important issues.

When the respondent amended his petition to introduce a second cause of action, an opportunity presented itself to contest the respondent's claim against the petitioner for the first time. This time the petitioner retained counsel and filed pleadings raising substantial issues to be determined by the trial Court. The petitioner introduced evidence to support the position he had taken. He had every opportunity to be heard and, in fact, he was heard. He had his day in Court. However, having heard all the evidence on the merits, the trial Court made no determination. It elected to give validity to judgment rendered against the petitioner, who was not properly represented and was never afforded a fair trial, if, indeed, a trial at all.

No theory of our jurisprudence is more basic or fundamental than the constitutional prohibition against depriving one of his property without due process of law. If, in fact,

as the record of the Maryland proceedings discloses, the petitioner was before the Court, did his alleged counsel afford him adequate representation? As we have seen, Mr. Kiley made no effort, whatsoever, to protect the interests of the petitioner. All of the mistakes, omissions and general confusion relating to the Maryland judgment could have been remedied had the trial Court, here, having jurisdiction to do so, made its own ruling on the merits.

An integral part of "due process of law" is the right to a "day in Court", that is, an opportunity to be heard. *Moore v. Smith*, 177 Va. 621. A personal judgment must rest upon personal service of process, or upon voluntary appearance either in person or by some duly authorized agent, otherwise there is want of due process of law. *Lickard v. Whitenack*, 151 Va. 143.

CONCLUSION

For the foregoing reasons stated herein, it is respectfully submitted that the writ of certiorari should be granted.

Respectfully submitted,

JOSIAH LYMAN
501 - 13th Street, N.W.
Washington, D. C.
NA 8-6158

Attorney for Petitioner

APPENDIX

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday the 19th day of January, 1970.

The petition of Malcolm B. Devers for a writ of error to a judgment rendered by the Circuit Court of Arlington County on the 6th day of August, 1969, in a certain action at law then therein depending, wherein District of Columbia National Bank was plaintiff and U.S. Metal Plastics, Inc., and the petitioner were defendants, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that there is no reversible error in the judgment complained of, doth reject said petition, and refuse said writ of error, the effect of which is to affirm the judgment of the said circuit court.

A Copy,

Teste:
Howard G. Turner, Clerk

By: /s/ R. P. Tomlinson
Deputy Clerk

IN THE

CIRCUIT COURT OF ARLINGTON COUNTY

DISTRICT OF COLUMBIA
NATIONAL BANK

Plaintiff,

v.

U. S. METAL PLASTICS, INC. **At Law No. 12277**

and

MALCOLM B. DEVERS

Defendants.

ORDER

This day came the Plaintiff, District of Columbia National Bank, and the defendant, Malcolm B. Devers, by their attorneys, and neither party requiring a jury, but waiving a trial by jury and submitting the issues heretofore joined between the parties to the Court in lieu thereof, the Court, after hearing all the evidence adduced, is of the opinion that there is due the plaintiff, from the defendant, Malcolm B. Devers, on the claim set forth in Count 1 of the Amended Petition for Attachment filed herein, the sum of $22,940.17, together with interest from February 1, 1965, plus attorneys' fees in the amount of $3,856.25; and that, being entitled to recover upon Count 1, as aforesaid, said plaintiff is not entitled to recover on Count 2.

And it appearing that the attachment issued herein was levied on the following real estate of the defendant, Malcolm B. Devers, to wit:

> Lots 1 through 62, except Lot 34, and one-half of Lot 35 in Block 7; Lots 18 through 26 in Block 8, situated between North Nash and North Oak Streets,

and between 12th and 14th Streets North, Radnor Heights, Arlington, Virginia, comprising an area of approximately 230,000 square feet, with improvements thereon, known as Prospect House, 1200 North Nash, Arlington, Virginia;

and that the said property is still under the levy of the said attachment,

It is, therefore,

ORDERED, ADJUDGED AND DECREED:

1. That the plaintiff do recover of and from the defendant the sum of $22,940.17, with interest from February 1, 1965 thereon until paid, together with attorneys' fees in the amount of $3,856.25, and its costs about the prosecution of its suit in this behalf expended; and

2. That Joseph V. Gartlan, Jr. who is hereby appointed a Special Commissioner of this Court for the purpose, shall, after first ascertaining the amount, validity and priority of all liens, encumbrances and other interests upon or affecting the real estate, sell, subject to confirmation of the sale by this Court, the same at public auction, for cash, in front of the Court House of the Circuit Court of Arlington County, in Arlington, Virginia, subject to all liens, encumbrances and other interests which shall have priority over the lien of said attachment as determined by said Commissioner, and confirmed by this Court, all after advertisement of the time, place, date and terms of sale in a newspaper having a general circulation in Arlington County, Virginia, at least once a week for four (4) successive weeks prior to the date fixed for said sale, and make report of his action hereunder to this Court. The terms of sale shall require (a) that all persons desiring to bid at the public auction shall first deposit with the Special Commissioner, bid deposits in the amount of $5,000.00 in the form of cash or certified check as a condition of the right to bid, said bid deposits to be returned to the unsuccessful bidders at the conclusion of the sale; and (b) that the successful bidder, upon confirmation of

the sale by the Court and the fixing of such additional bond if any, as may be required, shall deposit 25% of the sales price (less the $5,000.00 bid deposit) with the Special Commissioner to be held by him pending full settlement on the sale. Before said Special Commissioner shall make such sale at public auction, he shall execute a bond with approved surety before the Clerk of this Court in the penal sum of $5,000.00, conditioned as the law directs; and

3. This cause is continued generally.

TO ALL OF WHICH THE DEFENDANT, MALCOLM B. DEVERS, NOTES HIS EXCEPTION.

Entered: August 6, 1969 /s/ Charles S. Russell
Circuit Judge

I ASK FOR THIS:

/s/ Joseph V. Garthan, Jr.
Attorney for Plaintiff

SEEN AND EXCEPTED TO:

/s/ John Dalonas
Attorney for Defendant
Malcolm B. Devers

PREME COURT, U. S.

IN THE

Supreme Court of the United States

Supreme Court, U.S.
FILED
JUN 22 1970
E. ROBERT SEAVER, CLERK

No. [redacted] 178

MALCOLM B. DEVERS,
Petitioner,

v.

DISTRICT OF COLUMBIA NATIONAL BANK,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

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